ATTORNEY FOR APPELLANT:

JONATHAN R. ELROD
Elrod & Mascher, P.C.
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

PATRICK STERN
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHARLIE MILAM, d/b/a MILAM'S APARTMENTS,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 49A02-0511-CV-1108
JAMES LAKE and SUZANNE LAKE,	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven J. Rubick, Judge Pro Tem
Cause No. 49D01-0504-CC-15616

October 31, 2006

MEMORANDUM DECISION – NOT FOR PUBLICATION

MAY, Judge

Charlie Milam, d/b/a Milam's Apartments, was awarded damages from his former commercial tenants, James and Suzanne Lake. On appeal, Milam challenges the amount of damages; on cross-appeal, the Lakes challenge the award of damages. The Lakes argue Ind. Code § 32-31-3-12 applies to commercial as well as residential leases, and Milam may not seek damages because he violated that statute. By its terms, however, the statute applies only to residential leases. Accordingly, we affirm the award of damages.

Milam appeals because the trial court allegedly reduced Milam's damages by considering the Lakes' repairs to the property after a storm damaged it. Milam argues that, absent an agreement, a landlord has no duty to repair or reimburse damages to a rental property in exclusive possession of a tenant. The Lakes did not address Milam's argument in their appellees' brief. Because Milam has demonstrated *prima facie* error, we reverse and remand in part.[1]

FACTS AND PROCEDURAL HISTORY

In December 2001, the Lakes began leasing a garage and car lot from Milam for use as an auto repair shop. The Lakes paid a deposit of $600 and began paying Milam $1,400 per month in rent. The lease provided for late fees of $5 per day the rent was late,

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[1] Milam raises two other issues, arguing the amount of the "set-off of the cost of repairs," (Appellant's Br. at 6), was improperly based on speculation and conjecture, and the amount of attorney fees was "clearly against the logic and effect of the facts before the trial court." (*Id.* at 8.)

Milam asserts the attorney fees were "reduced by the set-off" he appeals. (*Id.* at 7.) To the extent the trial court reduced its award of attorney fees based on consideration of the storm damage and the Lakes' repairs, it erred. However, a trial court typically has wide discretion in awarding attorney fees. *Weiss v. Harper*, 803 N.E.2d 201, 208 (Ind. Ct. App. 2003). Because it is not clear the trial court exercised that discretion when it awarded only a portion of the attorney fees Milam sought, we direct the trial court to clarify the basis for its award of attorney fees.

Because we remand for recalculation of damages, we need not further address these issues.

and required the property be kept "clean of rubbish, trash and etc. [sic] at all times." (App. at 17.)

A storm caused structural damage to the building. The Lakes repaired the building, doing "around $10,000 worth of work when you included materials." (Tr. at 5.) Milam "provided the materials for the work to be done" and abated one month's rent. (*Id.* at 6.)

On September 1, 2004, the Lakes paid Milam only $780 in rent. Milam filed suit in small claims court on September 9, 2004.[2] The Lakes vacated the property on October 8, 2004. After the Lakes left, two of Milam's employees spent a week cleaning and repairing the property, including hauling off trash, caulking, and painting. Milam leased the property to a third party on November 1, 2004.

On March 16, 2005, the small claims court ruled in favor of the Lakes: "[T]he counter claim is for counter-plaintiff for $600.00 plus costs & 390.00 atty's fees." (App. at 18.)[3] Milam appealed the small claims judgment to the Marion Superior Court in April 2005. That court granted partial summary judgment for Milam, finding the "deposit return statute does not apply to commercial leases." (*Id.* at 4.)

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[2] For the most part, neither party has favored us with the pleadings from the original small claims action or the appeal to the superior court. Milam presumably sought the balance of the rent for September and added claims for damages after the Lakes vacated the property.

[3] We presume the Lakes' counter-claim as re-pled before the superior court was substantially similar to their original counter-claim before the small claims court, *i.e.*, requesting the return of the $600 security deposit, $4,200 "based on [Milam] not timely fixing the property so the premises could be operated as intended by the lease" (App. at 22-23), costs, and attorney fees.

The trial court held a hearing on damages only in October 2005. The trial court stated the hearing would be a "summary hearing" and directed counsel to "summarize your clients' respective positions and summarize the evidence that would be presented." (Tr. at 2.) Neither party objected to the summary proceeding format. Milam requested a total of $5,066.37, including unpaid rent for September and October, late fees, costs of cleaning and repairing the property, and attorney fees. The Lakes requested $1,200.00, consisting of their security deposit and attorney fees.

The trial court entered judgment for Milam as follows:

> **JUDGMENT**
>
> The Court, having heard argument from counsel on the sole issue of damages, and having reviewed the evidence herein and being duly advised in the premises now finds for the Plaintiff as follows:
>
> | | | |
> |---|---|---|
> | 1. | $620.00 | unpaid rent |
> | 2. | $365.00 | late fees |
> | 3. | $42.00 | dump bills |
> | 4. | $134.03 | paint and caulking |
> | 5. | $500.00 | attorney fees |
> | | $1,585.03 | total damages |
>
> In determining the issue of damages, the Court finds the storm damage to the premises is a factor that must be considered in Defendants' favor, as are the subsequent repairs to the premises performed by Defendants.
>
> Accordingly, Judgment is hereby entered in favor of Plaintiff CHARLIE MILAM d/b/a MILAM'S APARTMENTS and against Defendants in the amount of ONE THOUSAND FIVE HUNDRED EIGHTY-FIVE DOLLARS THREE CENTS ($1,585.03). Plaintiff shall

> retain the Six Hundred Dollar ($600.00) security deposit as a set-off against this judgment, leaving a balance due and owing from Defendants in the amount of NINE HUNDRED EIGHTY-FIVE DOLLARS THREE CENTS ($985.03).

(App. at 5.)[4]

DISCUSSION AND DECISION

1. Security Deposit Statute

The interpretation of a statute is a question of law reserved for the courts, and we review it *de novo*. *Blasko v. Menard, Inc.*, 831 N.E.2d 271, 274 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. The Lakes assert, without citation to legal authority, a "commercial lease and residential lease are to be treated as one and the same under Ind. Code Section 32-31-3-12." (Br. of Appellees at 4.) We disagree.

Under that statute, a landlord is required to return a tenant's security deposit not more than 45 days after the lease has been terminated and must include an itemized list of any damages or unpaid rent deducted from the security deposit. Ind. Code § 32-31-3-12(a). Failure to do so allows the tenant to recover the entire security deposit and reasonable attorney fees. Ind. Code § 32-31-3-12(b). "This section does not preclude the landlord or tenant from recovering other damages to which either is entitled." Ind. Code § 32-31-3-12(c).

Ind. Code § 32-31-3-10 defines "tenant" as "an individual who occupies a rental unit: (1) for residential purposes; (2) with the landlord's consent; and (3) for

[4] The trial court's total damages calculation is in error. The sum of the amounts listed in the order is $1,661.03, not $1,585.03. On remand, the trial court should correct this calculation appropriately in light of our other instructions.

consideration that is agreed upon by both parties." Ind. Code § 32-31-3-8 defines a "rental unit" as "as structure, or the part of a structure, that is used as a home, residence, or sleeping unit" by one or more individuals who maintain a common household, and "any grounds, facilities, or area promised for the use of a residential tenant" including apartment units and single family dwellings.[5] These statutes lead us to conclude Ind. Code ch. 32-31-3 applies to residential, not commercial, leases and the only "tenants" addressed in Ind. Code § 32-31-3-12 are "residential tenants." *See* Ind. Code § 32-31-3-10.

The Lakes have not alleged the car lot and garage were used for residential purposes or as a home, residence, or sleeping unit. Thus, the trial court correctly concluded the statute does not apply to the commercial landlord-tenant relationship between Milam and the Lakes.

2. Amount of Damages

Milam asserts the trial court erred in determining the amount of damages due him because the Lakes had no right to reimbursement for the storm damage. The Lakes have not responded to Milam's argument a landlord has no duty to repair leased premises. An appellee's failure to respond to an issue raised by an appellant is akin to failure to file a brief. *Vukovich v. Coleman*, 789 N.E.2d 520, 524 n.4 (Ind. Ct. App. 2003). Consequently, to justify reversal on this issue, Milam need only establish the trial court committed *prima facie* error. *Id.*

[5] We also note the legislature lists Ind. Code ch. 32-31-3 as a "residential landlord-tenant statute." Ind. Code § 32-31-2.9-2.

Milam argues he had no duty to repair the building after the storm because, generally, a "landlord has no duty to undertake repairs of premises in the tenant's exclusive possession." *Dickison v. Hargitt*, 611 N.E.2d 691, 697 (Ind. Ct. App. 1993). The Lakes may not seek reimbursement for repairs, he asserts, because: "In the absence of any contract upon the subject, the landlord is under no obligation to pay for repairs or improvements made by the tenant upon the demised premises." *Mull v. Graham*, 35 N.E. 134, 135 (Ind. 1893).

The Lakes have not alleged there was an agreement to repair or reimburse, nor was there any testimony regarding who held the insurance on the property. They have not suggested, nor has our research indicated, the general rule Milam quotes has been abrogated or modified. We conclude Milam has established *prima facie* error. Accordingly, we reverse and remand for the court to calculate Milam's damages without considering the storm damage and repairs done by the Lakes.[6]

Affirmed in part, and reversed and remanded in part.

BAKER, J., concurs.

SULLIVAN, J., concurs in result.

[6] We also note the trial court's calculation representing 73 days of late fees does not appear to be supported by the evidence.